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MAY 7 1964
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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1081

In the Matter of:

WALTHAM PRECISION INSTRUMENT COMPANY, INC., a corporation, formerly known as WALTHAM WATCH COMPANY, WALTHAM WATCH COMPANY, a corporation, JOSEPH AXLER and MELVIN AXLER, Individually and as Officers or former Officers of said corporations, *Petitioners*,

v.

FEDERAL TRADE COMMISSION, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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v.

FEDERAL TRADE COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Waltham Precision Instrument Company, Inc., a corporation, formerly known as Waltham Watch Company, Waltham Watch Company, a corporation, Joseph Axler and Melvin Axler, individually and as officers or former officers of said corporations, by their attorney, B. Paul Noble, pray that a Writ of Certiorari issue to review the "Final Decree Affirming and Enforcing Order To Cease and Desist"[1] entered

[1] Appendix "A", Case No. 14022.

by the United States Court of Appeals For The Seventh Circuit on the 19th day of February, 1964. That decree and order affirmed an Order of the Federal Trade Commission entered in its docket No. 6914 on October 16, 1962.[2] The Opinion of the Federal Trade Commission upon which that Final Order was based issued July 20th, 1962.[3]

OPINION BELOW

The Opinion of the Court of Appeals was entered January 8, 1964, in Case No. 14022 and is officially reported at 327 F2d 427.[4]

JURISDICTION

The United States Court of Appeals, Seventh Circuit, on January 8, 1964, entered its Opinion on Petition To Review a Cease and Desist Order of the Federal Trade Commission. Thereafter, that Court, on February 19th, 1964, entered its Final Decree Affirming and Enforcing the Commission's Order to Cease and Desist.

This Court, by its Order dated April 7, 1964, extended the time for filing this petition for a writ of certiorari until May 7th, 1964.[5]

The jurisdiction of this Court is invoked pursuant to Section 5 of the Federal Trade Commission Act, 15 U.S.C.A. 45(c); (g) and (h) and pursuant to 28 U.S.C.A. 1254(1) and 2101(c).

[2] Appendix "B".

[3] Appendix "C".

[4] Appendix "D" Waltham Precision Instrument Co. Inc. et al. v. F.T.C. 327 F2d 427.

[5] Appendix "E".

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Federal Trade Commission can ascribe to a trade name a meaning which identifies the products upon which it is used with domestic manufacture, so as to permit it to require affirmative disclosure of the country of origin of each component of such products not entirely manufactured in the United States?

2. Whether an Order, entered against predecessors in interest and management of a company already subjected, in part, to a similar order in another proceedings, is arbitrary and capricious or constitutes a denial of due process of law?

3. Whether the Federal Trade Commission in a Section 5 proceeding can require the user of a patent to cease and desist representing the patented device to be what the patent grant establishes it to be by application of a definition adopted prior to the advance in the prior art represented by the grant of that patent?

4. Whether the Federal Trade Commission can extend its jurisdiction under Section 5 of the Federal Trade Commission Act to the regulation of patents and trademarks, or whether this Court should delineate the extent to which that agency may encroach upon the jurisdiction of other regulatory agencies whose actions have given rights, in commerce, inconsistent and incompatible with Commission policy with respect to advertising?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The statutes involved in the determination of the questions presented are:

The Federal Trade Commission Act: Section 5(a),[6] (b);[7] 38 Stat. 719, 15 U.S.C.A. 45(a), (b). (Act of September 26, 1914, as amended).

The Lanham Trademark Act, 60 Stat. 433,[8] 458;[9] 15 U.S.C.A. 1064, 1115. (Act of July 5, 1946, as amended).

Article 1, Section 8 Clause 8, Constitution of The United States.

Patent Act of 1952, July 19, 1952, C.950 ¶ 1, 66 Stat 798 35 U.S.C.A. ¶ 103.

As provided in Rule 23(d) of this Court's Rules, the statutory provisions above noted are printed in the Appendix to this Petition.

CONCISE STATEMENT OF THE CASE

The jurisdiction of the Court below was based upon Section 5(d) of the Federal Trade Commission Act.[10]

These proceedings commenced October 14, 1957, by the issuance of the Complaint which alleged that the petitioners' advertising and representations were false, misleading and deceptive, in violation of Section 5 of the Federal Trade Commission Act.[11] An Answer was filed, setting forth that there had been a material change in corporate structure of the Waltham Watch Company, the Massachusetts corporation named in that orig-

[6] Appendix "F", 5 U.S.C.A. 45(a).

[7] Appendix "G", 5 U.S.C.A. 45(b).

[8] Appendix "H", 15 U.S.C.A. 1064.

[9] Appendix "I", 15 U.S.C.A. 1115.

[10] 15 U.S.C.A. 45(d).

[11] "Appendix to Petitioner's Brief", hereinafter referred to as P.A., filed with the record herein, pp. 1-6.

inal complaint.[12] Consequently, the Commission, on March 26, 1958, issued its amended and supplemental Complaint[13] which added the Waltham Precision Instrument Company, a Massachusetts corporation formerly known as the Waltham Watch Company; and also the Waltham Watch Company, a Delaware corporation as respondents. The same five individual respondents were named in both Complaints.

Hearings were held in Washington, D. C., Chicago and New York at various times between June 27, 1958, and December 2, 1960.[14] An Initial Decision[15] was entered by the agency examiner on November 13, 1961. Upon appeal to the Commission, an Opinion and Proposed Order issued July 21, 1962.[16] Thereafter, on October 16, 1962, the Commission adopted that proposed order as "Final Decree Affirming and Enforcing Order To Cease and Desist".[17] Upon Petition to Review, the Seventh Circuit Court of Appeals entered its Opinion on January 8, 1964,[18] and the "Final Decree Affirming and Enforcing Order To Cease and Desist"[19] to which this application is addressed, was entered on February 19, 1964.

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[12] P.A. pp. 6-9.

[13] P.A. pp. 9-14.

[14] 2 P.A. p. 21.

[15] P.A. pp. 20-38.

[16] Appendix (hereafter used in references to Appendix, this Petition for Writ of Certiorari). Appendix "C".

[17] Appendix "B".

[18] Appendix "D".

[19] Appendix "A".

The Final Decree Affirming and Enforcing adopts the Final Order of the Commission. It requires the petitioners here [20] to cease and desist:

> 1. Representing in any manner, directly or indirectly, including any number in the use of the name or names of their watches, that watches manufactured or sold by them contain a designated number of jewels, unless said watches actually contain a designated number of jewels, each and every one of which serves a purpose of protecting against wear from friction by providing a mechanical contact with a moving part at a point of wear.
>
> 2. Using the name "Waltham" in advertising or in labeling to designate or describe watches manufactured or sold by them without expressly, clearly, conspicuously, and prominantly stating in immediate connection therewith the country of origin of each component of said watches which is not entirely manufactured in the United States.

The Waltham Watch Company *of Massachusetts*, which had imported watches from Switzerland since about 1950, in 1956 granted an exclusive license to Hallmark, Inc. for the use of the tradename and trademark "Waltham" on watches. [21] In 1957, by virtue of a "spin off", the Waltham Watch Company, *a Delaware corporation*, acquired all of the assets and rights of the Massachusetts corporation in the watch and clock industry including the license agreement to Hallmark, Inc. [22] The Massachusetts corporation, at or about the time of the "spin off" to the Delaware corporation, changed its name to the Waltham Precision Instru-

[20] The agency Order dismissed as to all other individual respondents.

[21] P.A. pp. 27, 42, 43.

[22] P.A. pp. 27, 42, 43.

nent Company and has since continued to do business under that name in Waltham, Massachusetts, as a manufacturer of precision instruments other than watches and clocks.[23]

Immediately after the "spin off", the Waltham Watch Company moved its offices and principal place of business to New York City, operating there under the management and control of the Axlers (individual petitioners here) until 1959, when other interests (Aronson) acquired control of the Company, assumed its management, and moved the company to Chicago. This successor management was also the management of Hallmark, the licensee above referred to, and Hallmark and the Waltham Watch Company merged in 1959, consolidating the business vested by the license agreement (watches) with the remainder of the old Massachusetts business divested at the time of the "spin off" (watches and clocks).[24]

The Axlers were officers and directors of the Massachusetts corporation from December, 1956, until July, 1957. They became officers of the "spin off" (Delaware) corporation from its inception on June 30th, 1957, until Aronson (Hallmark) acquisition of control on or about July 1, 1959.[25] The Axlers have had no interest whatsoever in either of the corporate petitioners here since the date that Aronson interests acquired control of the Waltham Watch Company.[26]

The same Waltham Watch Company that is here

[23] P.A. pp. 25, 29, 109, 134, 135.

[24] P.A. pp. 83, 93, 94, 127-129, 137, 143.

[25] P.A. p. 27.

[26] P.A. p. 28.

petitioning this Court is presently subject to a Final Order of the Federal Trade Commission which is similar to the order here under consideration in respect to the prohibitions contained in each of them with reference to the use of the tradename Waltham.[27] A Final Decree Affirming and Enforcing was entered in that case on June 28, 1963.[28] That Final Decree affirms a final Commission Order[29] against the Waltham Watch Company, and its present management (Aronson).

The Final Order of the Commission there adopted an order entered by the hearing examiner in that Commission proceeding.[30]

The Order in that case, insofar as it is here actually material to the questions presented in this case, provides that the Waltham Watch Company (and the Aronsons) cease and desist:

> 1. Using or authorizing any person to use the name "Waltham" in connection with the sale of clocks or any other product unless it supervises said use and insures that the name is so utilized that:
>
> 1. The public is clearly warned by a statement immediately in connection therewith, that the product is not manufactured by the Waltham Watch Company of Waltham, Massachusetts, and

[27] Seventh Circuit Court of Appeals, October Term 1963, Case No. 13,858, *Waltham Watch Co., et al v. F.T.C.*; 318 F2d 28, decided 1963 (Cert. denied).

[28] Appendix "J", this petition.

[29] Appendix "K".

[30] Matter of Waltham Watch Co., et al. F.T.C. docket No. 7997, Appendix "L", this petition.

2. If the product is of foreign origin, the country of origin of the product is clearly and conspicuously disclosed on the product, on the advertising used in offering it for sale, and on any package or container in which the product is enclosed, in such manner that the name of the country of origin will not be hidden, obscured or obliterated.

II. Placing any means or instrumentality in the hands of others whereby they may mislead the public, as to the manufacturer of any product which they sell, the manufacturer's age, experience and reputation or the country of origin of the product.

As above mentioned, the Waltham Watch Company (original Massachusetts corporation) became an importer about ten years before the merger with Hallmark, Inc. of its "spin off" (successor) corporation, and about six years before the Axlers acquired control of the petitioner here now known as the Waltham Precision Instrument Company.[31] Hence, the historic old Waltham Company had become an importer even prior to the grant of license to Hallmark, Inc., which preceded control of the Axlers (petitioners here) that brought about the "spin off" of the watch and clock business to the Delaware corporation, that (after Arcanson control) merged with Hallmark — all of the so-called "domestic competitors" began importing at about the same time as the Massachusetts petitioners corporation.[32]

The present Waltham Watch Company is a manufacturer and an importer. It imports Swiss movements and the country of origin is marked under the numeral

[31] P.A. p. 139.

[32] P.A. pp. 27, 28, 42, 43; 135-145.

"6" on the face or dial of the assembled watches. Thus, as the owner by virtue of "spin off" of the trademarks and tradename "Waltham", it is continuing the same business acquired from the history rich Massachusetts parent corporation (now the Waltham Precision Instrument Company) but the plant has been moved from Waltham, Massachusetts, to Chicago, Illinois.[33]

The Representations

The Axlers had disseminated advertising statements such as:[34]

> "Watches that are worthy successors to the famed, history rich Waltham creations of the past 107 years."
>
> "The 25-jewel Premier by Waltham .... America's First Watch."
>
> "The 25-jewel Premier group has patented oil-reserve jewels, a horological development that adds 8 ruby jewels to the customary 17 friction bearing jewels."

Jewels

The Answer of the Waltham Watch Company admits that it imported 17 jewel watch movements from Switzerland and that, after importation, a patented device known as Resevoil and containing eight additional jewels was attached to the movements which were then represented as containing 25 jewels. It denies the deception alleged in the Complaint.[35]

René Fiechter is the inventor and co-owner with

[33] P.A. pp. 28, 42, 43, 83-94, 127-199, 95-109, 134-145.

[34] P.A. pp. 30, 31, 182-183.

[35] P.A. pp. 7, 8, 15, 16, 18, 29, 32, 33, 36, 43-48.

Allen V. Tornek of the Resevoil patents. The patents were granted by the United States Patent Office for "Lubricating Jeweled Bearings Of Watch Movements And Like Instrument Parts."[36]

As found by the examiner,[37] the second Fiechter patent (2,920,401)[38] is merely an improvement upon his first Resevoil patent (2,478,865).[39]

The two patents and the claims set forth in each of them describe the Resevoil jewels as "jewels" and "lubricating jewels".

Although the eight Resevoil jewels do not touch a moving part at a point of wear, they (when assembled in their plates to the basic 17 jewel movements) form constituent parts of newly constituted jewel bearings. Their addition to the movement improves the mechanism by providing additional oil where it is needed. This results in longer life expectancy of the movement and diminishes the need for cleaning the movements.[40] An expert called by the agency testified that Waltham's 25 jewel (Resevoil) watches were "25 jewel watches."[41]

REASONS RELIED ON FOR GRANTING WRIT

The decision of the Court below is novel. It affirms an agency order restricting or limiting the free use of a legitimate tradename and trademark by its lawful

[36] P.A. pp. 177, 178, 185, 186.

[37] P.A. p. 29, and since not inconsistent with other findings by the Commission adopted P.A. p. 52.

[38] P.A. pp. 185-187.

[39] P.A. pp. 177-181.

[40] P.A. pp. 31-36, 43-48.

[41] P.A. p. 80.

owner. Although the Commission has in the past required qualifications to be used in conjunction with the use of tradenames, it has heretofore confined that extension of its jurisdiction under Section 5 to cases where a mark or name having acquired special meaning or special significance was adopted as a tradename in order to pass off the user's product as having that special quality, whereas in fact it did not. It has not heretofore exercised such jurisdiction to limit or impair the right to use a tradename that has acquired a secondary meaning. The predecessor owner (Waltham Precision Instrument Company) was an importer and had established a ten year history of use of the name "Waltham" on imported watches. The name "Waltham" had lost its primarily geographic meaning as the name of a city in Massachusetts by 1899.[42]

The decision of the Court below is in conflict with the decision of the Supreme Court of the State of Massachusetts in that landmark trademark case.

The decision below is also novel in that it imputes a third meaning—"*Made in U.S.A.*" to a tradename that had acquired a secondary meaning by which its use by the owner on its products identified such products with the owner in derogation of the original geographic meaning. Requiring petitioners to qualify their use of "Waltham" by using a statement in conjunction therewith as to the *country of origin of each component of foreign origin* assumes a novel legal concept without precedent, to wit, Waltham has, since 1899, come to mean "*Made in U.S.A.*" It must be borne in mind that the products are conceded to be marked in con-

[42] *American Waltham Company v. U.S. Watch Co.*, 173 Mass. 85, 53 N.E. 141 (1899).

formity with requirements of the Bureau of Customs with respect to marking the country of origin.

This Court is asked to decide whether the Federal Trade Commission can base a cease and desist order upon a theory that deception arises when the owner of a valid tradename makes the economic determination to use his property in that name on products that contain imported components, where theretofore he has used the tradename only on products domestically manufactured, and where the goods are properly marked as to the country of origin of such components.

The novel Commission theory advanced by its decision here is that deception arises merely from the use of the tradename, not from the failure to reveal country of origin.

It is not claimed and the record did not establish that "Waltham" had a special significance or special meaning denoting quality. The Commission has maintained throughout the course of these proceedings that "Waltham" has come to mean manufactured in the city of Waltham, Massachusetts, of domestic components, hence, that its use without qualification on goods containing imported components is deceptive.

In doing so here [43] the Commission has either acted arbitrarily and capriciously in extending its jurisdiction in a Section 5 proceeding into areas where the Commissioner of Patents and Secretary of the Treasury have heretofore exercised exclusive jurisdiction, or it has, in its quasijudicial administrative exercise of powers granted, established a precedent in the law of

[43] And in the earlier Waltham case in another way, *Waltham Watch Co. v. F.T.C.*, supra.

trademarks and tradenames of vast economic significance to the national economy, since many other historically domestic tradenames are being used by their present owners on goods composed in whole or in part of imported components marked merely in conformity with Treasury Department requirements as to country of origin. This Court should consider and determine whether the Federal Trade Commission has been delegated such power by Congress or whether its assumed novel jurisdiction here is, indeed, arbitrary and capricious.

In addition, the Court is here asked to decide for the first time whether the Commission can enter two orders against the same company, both relating to the same subject matter, and whether an order against a corporation and its present officers is res judicata so as to bar the entry of a similar order against the corporate and managerial predecessors of the company in another case where the predecessors are no longer connected with the business or in any way chargeable with the conduct of its affairs. As a corollary, the Court is asked to determine as a novel question whether two orders of the Commission, both related to the same subject matter, and, in part, to the same parties, will result in such confusion in their enforcement as to constitute a violation of due process of law or a confiscation of property in denial thereof.

Finally, the Court is asked to determine whether the Commission can vitiate the use of products developed under the valid grant of a patent, when it finds that such use is deceptive because it falls outside the scope of an administrative definition established prior to the advance in the prior art represented by the patent. The Court should consider whether the exercise of such

jurisdiction by the Commission is in violation of Article 1, Section 8, Clause 8 of the Constitution of the United States.

ARGUMENT

The Trade Name "Waltham"

Undisputed Facts

It is suggested that the following salient facts are not in dispute:

1. Waltham Watches were being imported by the famous old Waltham Watch Company of Waltham, Massachusetts, long before the license agreement with Hallmark, Inc., and the "spin off" that resulted in the creation of the Waltham Watch Company (of Delaware).

2. The Waltham Precision Instrument Company, formerly known as the Waltham Watch Company, has not been engaged in the business with which the Complaint in the proceedings below is concerned.

3. The individual Petitioners here, Joseph Axler and Melvin Axler, have not been connected with the Waltham Watch Company since 1960.

4. The alleged representations are neither false nor misleading unless the tradename "Waltham" has lost its proprietary (secondary) meaning and acquired a third meaning which identifies it with products solely of American manufacture.[44]

5. The representations alleged were all made by the old Waltham Watch Company (Massachusetts).

[44] The clause commencing with *unless* in this order quoted below involves a question of what Petitioners submit to be novel law.

"The Law of Trademarks is one cornerstone of the law of unfair competition; considerations arising out of the competitive relationship, therefore, should prevail over any claimed public right. Such a right cannot be invoked as a shield for the furtherance of unfair competition." [45]

Petitioners urge that the Commission's Order is arbitrary and capricious in that it would require them to cease and desist:

> Using the name "Waltham" in advertising or in labeling to designate or describe watches manufactured or sold by them without expressly, clearly, conspicuously and prominently stating in immediate connection therewith the country of origin of each component of said watches which is not entirely manufactured in the United States.

It is conceded that the Waltham Watch Company has acquired by succession the rights to the use of the trademark and tradename "Waltham" which had originally vested in a watch enterprise started by Aaron Dennison in 1849 in Waltham, Massachusetts.

There is no evidence in the record to disprove or establish the falsity of any of the representations made by petitioners with respect to their watches, nor have either the Commission nor the Court of Appeals relied upon such evidence to sustain the orders entered.

The Commission's Order and the Court's Decree are both predicated upon the theory that the unqualified use of the tradename "Waltham" and of truthful slogans concerning the product becomes deceptive when

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[45] Callman, Rudolph, "Unfair Competition and Trade Marks" (Callaghan, Chicago, 2nd Ed.) Vol. 3, page 1671.

the product is composed of imported components.[46]

The Commission, in substance, found that watches containing Swiss movements were sold under the tradename "Waltham" and by the use of slogans in advertising both of which deceptively represented them to be entirely manufactured in Waltham, Massachusetts.

It is submitted, that in so finding, the Commission has given to "Waltham" the third meaning that is without precedent. In so doing, it is respectfully submitted, it has blasted away one of the cornerstones of the law of unfair competition by permitting a misconceived sense of public right to prevail over considerations arising out of the competitive relationship. It has invoked this false claim of public right as a shield for the furtherance of unfair competition.[47]

The Commission assumed the gravamen of Petitioner's argument to be true, i.e. Waltham, when used on watches has come to mean watches made by the owner of that tradename, then, argues that it furnishes no defense to a charge of the use of the name "Waltham" to falsely represent that the watches were manufactured in the United States.

It is submitted that this Court may well consider the following expression by the Court in an earlier case involving a similar order against one of the petitioners here.

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[46] For emphasis, it is here repeated that the original company (Massachusetts corporation) became an importer long before the Axlers in the succession of its management, used the slogans complained of below.

[47] *Singer Mfg. Co. v. June Mfg. Co.*, 166 U.S. 169, 41 L. Ed 118; (1896); and see also; *McLean v. Fleming*, 96 U.S. 245; 24 L. Ed. 828 (1878).

The Court of Appeals [6] in the earlier Waltham case stated:

> "Although if we were fashioning the remedy, we might have done so in some respects differently from that of the Commission, yet, as the function is primarily that of the Commission, we will approve the Order as the Commission prepared it."

It must be noted that the Order here is much more broad than it was there. The Commission there required that the public be warned by a statement in conjunction with the use of "Waltham" that the product is not manufactured by the Waltham Watch Company of Waltham, Massachusetts; and that if the product is of foreign origin, the country of origin be clearly disclosed on the product and on the advertising used in offering it for sale.

The Order here being reviewed would go even further and require petitioners to clearly disclose the country of origin *of each component of "Waltham" watches not entirely manufactured in the United States;* and from using terms such as "America's first Watch," and "the first American Watch Company" (even though there is no evidence either that these terms are false or that they are deceptive).

In the case at bar, the Court is considering distinctively different facts, altogether different evidentiary factors and, most significantly, the advertising and marketing policy of the old company involving representations that are true and sans evidence of deception.

It is respectfully submitted that, in addition, the Court there relied upon cases that are not dispositive of the issues raised. Conceding that those cases are

[6] *Waltham Watch Company v. F.T.C.*, 318 F. 2d 28 (at 29)

authority for the proposition that "the owner of a trademark or tradename may not use, nor permit the use of, such trademark or tradename in a manner designed to deceive the public," it is nevertheless respectfully submitted that the lawful owner's decision to use a validity acquired trademark or tradename on imported rather than domestic products is not deception.

In the Singer case[19] where the effect of a generic word was in issue, this Court said it did not follow that the general power, vested in the public, to use the name imports that there is duty imposed on the one using it to adopt such precautions as will protect the property of others and prevent injury to the public interest, where by doing so no substantial restriction is imposed on the right of freedom of use—"This principle is elemental and applies to every form of right and is generally expressed by the aphorism 'sic utere tuo ut alienum non laedas'—".

The Commission must repeatedly fall back upon its contention that the sale of imported watches under the tradename "Waltham" is deceptive because the "name (has) long (been) associated by the public with entirely American made products."

It must do so because there is no evidence of deception and because the alleged false representations are true, unless when used in conjunction with the name Waltham on imported watches they become deceptive or false and misleading because that name has acquired a third meaning which identifies it with products made in the U.S.A.

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[19] *Singer Mfg. Co. v. June Mfg. Co.*, 163 U.S. 169, 41 L. Ed. 118 (1896).

We submit that there is no precedent for such a proposition, none has been cited nor can any be inferred from the precedents relied upon.

"Waltham" Does Not Mean "Made in U.S.A."

"Waltham" is a valuable property right now owned by the Waltham Watch Company of Delaware.

After the "spin off" the Massachusetts corporation changed its name to the Waltham Precision Instrument Company, Inc., which has been engaged in the precision instrument business (other than watches) in Waltham, Massachusetts. The Waltham Watch Company has been engaged in the manufacture, importation, distribution and sale of watches since the "spin off," and since the merger with Hallmark, Inc., its plant and principal place of business has been located in Chicago.[50]

The Final Order of the Commission would require all of the Petitioners here to cease and desist from:

> Using the name "Waltham" in advertising or in labeling to designate or describe watches manufactured or sold by them, without expressly, clearly, conspicuously, and prominently stating in immediate connection therewith the country of origin of each component of said watches which is not entirely manufactured in the United States.[51]

The learned Commissioner, delivering the Commission's Opinion, stated:[52]

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[50] P.A. pp. 27, 28, 42, 43, 50, 83-93, 127-129, 94-109, 134-137, 138-143.

[51] Appendix "B" this petition.

[52] Appendix "C" this petition.

> The record shows . . . that the name Waltham has, over a period of 100 years and more, come to be associated by the public with watches manufactured by the famous old American company bearing that name. As the advertisements above quoted show, the Axler management and Hallmark exploited this common understanding of the name Waltham by repeatedly referring to it as "'America's Finest Watch'; made by the "first American watch company", etc., etc. The fact is, however, that the movements of the watches sold by respondents under the name "Waltham" are not made in the United States at all, but are imported from abroad. The sale of such watches under a name long associated by the public with entirely American made products—an association obviously accentuated by respondents' own advertising—is obviously deceptive.

It is upon this fallacious reasoning that the Commission has rested the portion of the Order here under consideration.

The reasoning is fallacious unless a novel, unprecedented concept of trademarks and tradenames will here be judicially sanctioned. The proposition that a tradename can acquire a meaning which identifies the products upon which it is used with American manufacture is absolutely without precedent in the law of trademarks and tradenames.

Secondary Meaning

"Waltham" had acquired a secondary meaning which had been judicially recognized by 1899.[33]

By that time it had acquired common acceptation by

[33] *American Waltham Co. v. U.S. Watch Co.*, 173 Mass. 85; 53 N.E. 141 (1899).

long and continuous use and had lost its primarily geographic significance.

In other words, though it originally had meant "watches made in Waltham, Massachusetts," by 1899 the court had come to recognize the legal fact that it had lost that geographic significance and come to mean watches manufactured by the owner of the tradename. Had it not acquired this secondary meaning, it could not have become a tradename.

Now the Commission, by its Order, and in the proposition of law quoted above as its basis, would restore the geographic significance which Waltham had lost by 1899. In fact, it would not only restore that geographic meaning, but broaden it from mere identification of a town in Massachusetts to mean "made in the United States" when used on watches. There is no precedent to support such a restoration, and the cases relied upon by the Commission and the Court below are not authority for the proposition.[24] The order here is in direct conflict with the opinion of the Massachusett's Supreme Court there.

It is a well known fact that many large American companies have become importers. As above noted, in the Concise Statement of the Case, the record here establishes that Bulova, Elgin and Hamilton, all competitors of Waltham, have become importers and that the Massachusetts corporation now known as Waltham Precision Instrument Company became an importer in 1950, long before the license to Hallmark, Inc. or the "spin off" of the watch business to the Delaware peti-

[24] *Edw. P. Paul & Co., Inc. v. F.T.C.*, 169 F. 2d 294 (C.A.D.C. 1948). See also other cases cited in footnote 6, P.A. p. 50, but compare *F.T.C. v. Walker's New River Mining Co.*, 79 F. 2d 457, 586, (C.C.A. 4, 1935).

tioners.[55] Waltham, like all competitors, marks the country of origin under the numeral "6" on the face or dial of the imported watches in conformity with the requirements of the Tariff Commission.[56]

Obviously, the above quoted portion of the Commission's Order singles out Waltham in a highly competitive industry and would unfairly and inequitably require it to "water down" its tradename, while competitors whose acts and practices are identical, will continue to use their equally well established tradenames without qualification or limitation.

The value of a tradename or trademark is vested in the right to use it for advertising and marketing.

It would appear that the Commission, having a mandate from the Congress to maintain fair competition, is here fostering unfair competition. Quaere; If the Massachusett's Petitioner were to re-acquire the rights to the tradename, could it use it without qualification on imported movements in the same manner it did before licensing that use to Hallmark, Inc.?

The Waltham Case Decided in 1899[57] is Res Judicata On The Issue of Secondary Meaning, and the Decision Below in Conflict With that Decision

That case is a landmark in the law of secondary meaning and discussed by every authority who has written in the field of tradenames and trademarks.

There the respondent had begun the manufacture of watches in Waltham in bona fide. The problem

[55] P.A. p. 139.

[56] P.A. p. 139.

[57] *American Waltham Co. v. U.S. Watch Co.*, supra.

which arose was stated by the late Mr. Justice Holmes, then presiding judge of the Massachusetts Court as follows:

> It is desirable that the Plaintiff should not lose customers by reason of the public mistaking another manufacturer for it. It is desirable that the Defendant be free to manufacture watches at Waltham and to tell the world that it does so. The two desiderata cannot both be had to their full extent and we have to fix the boundaries as best we can (Page 86 of that decision).

Confronted with this problem, the Court there decided that the predecessors of petitioners had made the name Waltham so widely known for watches that the primary trade meaning of the word "Waltham" in fact indicated the Plaintiff's article and not the geographical locality. Consequently, the Court deemed the mark "Waltham" a valid common law trademark and enjoined the Defendant absolutely from using "Waltham" in a trademark sense and in particular from advertising its watches as "Waltham" watches. But the Court went even further, enjoining the Defendant from a nondenominative use of the term by also forbidding the Defendant to state upon the dials of its watches that they were made in Waltham. The Defendant was not even allowed to use the name Waltham, Massachusetts, on the inner plates of its watches without an accompanying statement clearly distinguishing its watches from those of the Plaintiff.[5]

Geographical names having attained a controlling secondary meaning have been held valid regardless of the domicile of the producer. It is common knowl

[5] Derenberg, Walter, "Trade Mark Protection and Unfair Trading," Matthew Bender, Albany, N.Y., 1936, page 341.

edge, for instance, that a consumer buying "Paris" garters,[59] "Philadelphia Cheese",[60] etc., does not believe or understand that the products he is buying emanate from the geographical place captured in the tradename.

In the "Phillies" cigar case,[61] the right to use the word "Phillies" in the tradename was upheld even though the evidence established that as far back as 1932 many of the company's cigars were manufactured in New Jersey.[62]

It is also well settled that the right to protection of a geographical name that has acquired secondary meaning, "is not lost because the one using it moves his plant to a place which does not bear the name which has thus been used as a tradename . . ."[63]

The Effect of Waltham's Move to Chicago from Massachusetts

Since it should be conceded that Petitioners could have escaped the bondage of the negative limitation or positive disclaimer required by this Order had they remained in Massachusetts after acquiring control of the company, the Court must acquire into the significance of the move to Chicago.

[59] *A. Stein & Co. v. Liberta Garter Co.*, 198 F. 959 (D.C.S.D.N.Y. 1912).

[60] *Intl. Cheese Co. v. Phoenix Cheese Co.*, 103 N.Y.S. 362 (1907).

[61] *Bayuk Cigars v. Schwartz*, 1 F. Supp. 286 (D.C.N.J. 1932).

[62] See also: *Anheuser-Busch v. Budweiser Malt Products Co.*, 295 F. 306 (C.C.A. 2, 1923); *Hyde Park Clothes, Inc. v. Hyde Park Fashions, Inc.*, 204 F. 2d 223 (C.C.A. 2, 1953).

[63] Nims, Harry D., "Unfair Competition and Trade Marks," Baker, Voorhis & Co., Inc., N.Y., 4th Ed. 1947, Vol. 1, page 315.

The Commission has never challenged the validity of the present ("spin off") company's title to the tradename and trademarks "Waltham". However, by virtue of its order, it does challenge the right to use those properties in Chicago in the same manner they could have been used had economic or other considerations advised management to remain in Waltham and import as the Massachusetts corporation had prior to the Hallmark license.

Petitioners respectfully submit that the Commission in so doing completely ignores the wealth of law controlling this issue.

The prominent trademark authority, Harry D. Nims, has treated this subject at some length:

> The right to protection of a geographical name used to indicate source, is not lost because the one using it moves his plant to a place which does not bear the name which has thus been used as a tradename. This is not a reason why he may not continue to claim protection in the use of the name of the place where formerly he was located, if prior to the time of his removal he has acquired a secondary meaning as used by him. (Badlin v. Cusenier, 221 U.S. 580, 31 Supreme Court 669 (1910).)

In Siegert v. Gandolfi,[31] it is stated that:

> If the geographical name has become a secondary designation indicative of the product of the particular manufacturer, it is as much entitled to protection as any arbitrary or fancy name which he might have selected; and the circumstances that the manufacturer might have removed his place of business and is making his product in some other place is of no more consequence that it would be if he had adopted the fancy name.

[31] *Siegert v. Gandolfi*, 149 F. 109 (C.C.A. 2, 1906).

There, complainants were the successors of the original manufacturer of "Siegert's Angostura Bitters" with which the name "Angostura" had long been identified. This was the name of a city in Venezuela where the bitters were first made, though the factory had long since been transferred to Trinidad. Defendants made bitters of a similar kind at Baltimore, and sold them as "Angostura" Bitters imitating at the same time complainant's bottles and labels, but correctly stating in the labels and circulars their own name and the place of manufacture. However, the word "Angostura" had acquired a secondary meaning and was not open to the use of Defendants and these rights were not lost by the removal.

It is interesting to note in connection with the petitioner's argument that the deception found is novel and predicated upon the use of the tradename "Waltham" on watches with imported movements, the following statement of the hearing examiner in his initial decision:

> This is not a case where an importer brings foreign made goods into the country and fails to reveal their foreign origin to the public. In this case the old and famous American name "Waltham" is used repeatedly in various ways to mislead the public into believing that the old Waltham firm is still manufacturing all parts of its watches in the United States.[65]

As was earlier noted, the Commission in its Opinion reiterated this fallacious theory that deception can arise out of the mere use of a valid tradename by its American owner on goods that are imported in whole or in part.[66]

[65] P.A. p. 37.

[66] P.A. pp. 49-51.

But, as was above pointed out, the right to use a valid geographic tradename which has acquired secondary meaning is vested in the owner of that tradename.

If the Ford Motor Company wishes to sell Fords imported from Afghanistan, it has a right to do so. In other words, the owner of a valid tradename can "water down" its property but the Federal Trade Commission cannot order it to do so. By the same token, Ford, which now imports many components into the manufacture of a once wholly domestic product, cannot be required to label each component as to its foreign origin merely because the product sold is a Ford.

The proposition underlying the Order here would require all name brand manufacturers to either discontinue the importation of foreign components and products (contrary to economic public policy) or to label the ultimate product like a bill-board, disclosing the foreign origin of each imported component. There is no basis in law to support that proposition.

A tradename once acquired cannot, as the Commission contends, pass into the public domain. The property right vests, rather, in the owner of the tradename. It identifies the product with the owner and becomes a property which is subject to the owner's control. The public has no vested interest in the exercise of control over private property of this nature any more than it does over general rights in and to personal property.

"Waltham" having acquired a secondary meaning by 1899 has come to mean watches made by the owners of that tradename. It is conceded that Petitioner, Waltham Watch Company, has by succession acquired such right and owns the name.

Hence, Waltham does not mean made in Waltham, Massachusetts, it had lost that meaning by 1899—nor does it mean made in U.S.A.—as the Commission contends. It means that the watches upon which it is used as a tradename are the products of the owners of the tradename, i.e., the Waltham Watch Company, successor in a line of direct descent from "America's First Watch."[67]

Since there is no deception alleged other than that involving the use of "Waltham" on imported watches superior in quality[68] to those formerly made by prior owners of the tradename in Massachusetts, this Court may well consider granting this petition and determine the limits of the Commission's jurisdiction to interfere with historically valid use of domestic tradenames on imported goods.

Improper Parties

The Waltham Precision Instrument Company has had nothing to do with the watch business since the "spin off" of that business to the Waltham Watch Company in 1957.[69]

The Axlers have had nothing to do with the Waltham Watch Company since acquisition by Aronson interests of control in 1959.

The Commission has entered a Final Order which

[67] *Gebbie v. Stitt*, 82 Huh. (N.Y.) 93; 31 N.Y. Supp. 102. Compare *El Moro Cigar Co. v. F.T.C.*, 107 F. 2d 429 (C.C.A. 4, 1939). See also: *ex parte Fils de R. Picard et Cie*, 9 U.S.P.Q. 208 (Comm. of Patents, 1931) and *Hazel Bishop, Inc. v. Perfemme, Inc.*, 137 U.S.P.Q. 4 at page 5; (C.C.A. 2, 1960).

[68] P.A. p. 135.

[69] P.A. p. 42.

has been affirmed by the Court in case No. 13,858 (F.T.C. Docket No. 7997 supra) against one of the petitioners.

The Order there requires that the Waltham Watch Company (and its officers) use and supervise the use of "Waltham" in connection with the sale of clocks or any other product to insure:

"1. The public is clearly warned by a statement immediately in connection therewith, that the product is not manufactured by the Waltham Watch Company of Waltham, Massachusetts, and

2. If the product is of foreign origin, the country of origin of the product is clearly and conspicuously disclosed on the product, on the advertising used in offering it for sale, and on any package or container in which the product is enclosed, in such manner that the name of the country of origin will not be hidden, obscured or obliterated."

Paragraph 2 of the Order in this case provides:

"(That Petitioners cease and desist) 2. Using the name "Waltham" in advertising or in labeling to designate or describe watches manufactured or sold by them, without expressly, clearly, conspicuously and prominently stating in immediate connection therewith the country of origin of each component of said watches which is not entirely manufactured in the United States."

Petitioners submit that the Order (in the portions here discussed) are redundant, confusing, and that the entry of a second order against the Waltham Watch Company constitutes administrative harassment in the

circumstances and is a violation of due process of law.[70]

Petitioners further submit that the order against Waltham Precision Instrument Company, out of the business with which the Commission is here concerned since 1957, constitutes an abuse of administrative power and a denial of due process of law.

In addition, the Order against the Axlers who have been out of the business at hand since 1959 will likewise constitute an abuse of delegated powers and is arbitrary and capricious.

Jewels

It should be pointed out that the representations set forth in paragraph four of the complaint form the gravamen of the issue as to representation of jewel content.

The representations complained of—all relating to the Waltham Premier line—are similar to the following, quoted from paragraph four:[71]

"The 25 jewel premier group has patented oil-reserve jewels, a horological development that adds 8 extra ruby-jewels to the customary friction bearing jewels."

It should here be noted that the Commission, in reversing the Initial Decision in the Matter of Allen V. Tornek,[72] did not reverse, qualify, modify or other-

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[70] *Carter Products, Inc. v. F.T.C.*, 196 F. 2d 821 (C.C.A. 7, 1951). See also *Jacob Siegel Co. v. F.T.C.*, 327 U.S. 608, 612; 66 S. Ct. 758, 760, and *D.D.D. Corp v. F.T.C.*, 125 F. 2d 679.

[71] P.A. p. 11.

[72] Matter of *Allen V. Tornek*, F.T.C. Docket no. 6344, 276 F. 2d 513.

wise alter its findings that Resevoil, when attached to a watch movement, "significantly increased the amount of oil to vital parts and assures longer life expectance thereof."[73]

We submit that the Waltham representations here at issue truthfully and accurately qualify the use of the word "jewel" in the company's advertising of 25 jewel (Resevoil) Waltham watches.

Waltham has merely restated the Commission's holding with reference to Resevoil in representing that the 25 jewel watches have "*patented oil reserve jewels, a horological development that adds 8 extra ruby jewels to the 17 customary friction bearing jewels.*"

It is submitted that Waltham's representations of its use of Resevoil, are in accord with the ruling of the Commission in Tornek and not false, misleading or deceptive.

What is a Frictional Bearing?

Insofar as the jewel issue is concerned, the essence of the Order is that a watch jewel to be represented as such, must serve a mechanical purpose as a frictional bearing, that is; each jewel must provide a mechanical contact at a point of wear—that Resevoil jewels do not meet this test.

In fact, the definition is pleaded as part of the allegation in Paragraph Five of the Complaint.[74] The Complaint assumes that this definition is the one known

[73] Commission Conclusion 5, "Findings as to the Facts, Conclusions and Order", Matter of Allen V. Tornek, F.T.C. Docket No. 6344, issued May 13, 1959, page 10.

[74] P.A. p. 11.

to the public and adopted by the industry. But the record here refutes that assumption.[75]

It is submitted that the determination of the definition of a watch jewel is a question of fact and not a legal conclusion.

Apart from the pleading of the definition there is absolutely no testimony or other evidence in this record that a jewel must serve a "mechanical purpose as a frictional bearing; that is, provide a means of contact with a moving part at a point of wear", nor that this definition is known to the trade much less the public.

Since pleading is not proof, a minute review of the record may be in order.

Counsel supporting the complaint offered no evidence whatsoever tending to prove or substantiate the alleged definition, which the answer of Waltham definitely put in issue.

The weight of the evidence, adduced from many well qualified experts called by petitioners is that there is no such thing in physics or mechanical engineering terminology as a "frictional bearing." These same experts, on the other hand, establish, that a watch jewel to be represented as such and as understood technically and among watch makers or in the trade, *must be functional in a watch and usually performs a lubricating function* as a part of a jewel bearing or jewel bearing assembly.[76]

Since the Tornek case, which established the functional utility of 21 jewel Resevoil based upon the earlier

[75] P.A. pp. 146-170.

[76] P.A. pp. 146-176.

Fichter patent (August 9, 1949, #2,478,865), the Court should, and the Commission did not, review and consider this record in light of the later patent (January 12, 1960, #2,920,441).[77]

Two of the three government experts were not familiar with Resevoil at all.[78] Schwartz alone, and he was a Bulova employee, contravened the presumption raised by the grant of the U.S. Patent and his testimony by sheer force of numbers is outweighed by the testimony of the many other disinterested experts who were called to testify.[79]

The Court is asked to take official notice of the acts of Congress relating to the grant of patents insofar as they prescribe that the grant of a patent is prima facie evidence of the utility and novelty of the thing patented.

Since the presumption is not rebutted in this record, the Fichter patents must protect the Fichter invention of a functional device known as Resevoil, which the patents themselves establish as an advance in the prior art of jewel bearings.

But if evidence to support the prima facie presumption of the statute is needed, it is here present. The record establishes that 8 jewel Resevoil is superior and mechanically distinct from 4 jewel Resevoil; that both improve the jewel bearings of which, upon assembly, they become a functional part by adding lubrication to the bearing thus providing for longer and more efficient life of the bearing. In turn both the 4 and the 8

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[77] Both patents are in evidence, P.A. pp. 177-181; 185-187.

[78] P.A. pp. 63-67; 68-82.

[79] P.A. pp. 110-125.

jewel Resevoil type bearing are improvements in the prior jewel bearing art and superior to the simple hole jewel bearing and the standard cap jewel bearing assemblies of the prior art.[80]

By force of the patent, the findings of the Commission in the Tornek case above referred to and on the weight of testimony in this record, the 8 jewels used by Waltham in 25 jewel Resevoil type watches are functional as parts of watch bearings and as such fall within the definition established by the evidence in this record of a jewel; they are accordingly properly represented as jewels by the Waltham Watch Company.

Did the Court of Appeals' Definition of a Jewel Differ From the Commission's in Tornek?

In its per curiam opinion in Tornek referred to above and by the Commission in its Opinion here, the Court said:[81]

"Examination of the testimony before the Federal Trade Commission shows clearly that in the 21 jewel watches commonly sold by others in the trade, there are no jewels that do not serve *either a function of bearing or a function of prevention against wear from friction.*"

Appellants here argue that the above is a judicial determination of the definition of a watch jewel which differs from that pleaded here,[82] and since the evidence above referred to establishes that the 8 jeweled Resevoil device, by adding lubricant at vital parts of the

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[80] P.A. pp. 145-179.

[81] *Allen V. Tornek v. F.T.C.*, 276 F. 2d 513.

[82] P.A. p. 2.

movement, serves the function of "prevention against wear from friction" as was the expert opinion of every witness asked the specific question, the Commission's findings on the Resevoil issue are, it is submitted, arbitrary and capricious.

That the examiner had difficulty in reconciling the pleaded (Commission) definition of a jewel with the portion of the opinion in the Tornek case above quoted is quite apparent.

In his initial decision,[53] the examiner disposes of this argument by saying—"this is clearly not what the Court intended by its language since it affirmed the Commission's order . . .", and "that it is undoubtedly what the Court of Appeals meant to express by its alternative reference."

But the language is precise and clear and no rationalization of what the Court "meant" or "intended" is necessary.

Had the Court, on review of the Tornek record, meant merely to adopt the Commission definition that a jewel must serve a mechanical purpose as a frictional bearing, it could have done so by simply restating the Commission definition. But, by the use of other language providing alternative definitions for watch jewels, the Court reflected its review of the record and expressly provided its own definition, one which had never before been used by the Commission.

Petitioners argue that the Court of Appeals was stating, as a fact, the definition in the trade or watch industry, in its opinion, and that its statement is inconsistent with the findings and conclusions of the exam-

[53] P.A. p. 35

ner here (based upon the pleaded definition) and inconsistent with the evidence in this record.

Throughout this case, the Petitioners have argued and their evidence established that the 8 patented oil reserve jewels in Resevoil used by Waltham increase the efficiency and extend the longevity of the moving parts of the watch by adding lubrication to the bearings. In so doing those jewels must, a fortiorari, "prevent against wear from friction" since that is the gist of the lubricating function of all jewels in all bearings.

This Court has held that language of a Court of Appeals must be consistent with the facts and construed to mean exactly what is said where precisely and clearly stated.[84]

While the cases cited involved interpretation of the Internal Revenue Code, the principal is the same as in the case at bar. The two distinct definitions cannot stand antipodal without the creation of industrial confusion.

It is most respectfully here submitted that the controlling definition since Tornek has been that above quoted from the Court of Appeals decision and not that of the Commission in Tornek which was pleaded in the Complaint here.

How Can This Patented Device Be Represented?

The Court must give some consideration to the patent aspects of this case. As was pointed out above, Fichter the inventor of Resevoil, acquired two U.S.

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[84] *C.I.R. v. Church's Estate*, 335 U.S. 632; *Helvering v. Hallock*, 308 U.S. 106; *Helvering v. St. Louis Transit Co.*, 296 U.S. 38.

patents. The plates referred to in the record as Resevoil plates are based upon those patents and are supplied to Waltham, among other customers, by Fichter's successor in interests to the patents, Resevoil International, Inc.

The patents never were acquired by Waltham or any of the respondents contrary to the Commission's findings.[25]

It must be conceded that the Commission cannot, in Section 5 proceedings, nullify a patent or extinguish its use by a patentee or his successors in interest.

In other words, no order of the Commission has, nor can one ever require the holders of Resevoil patents to cease and desist from producing Resevoil plates. Nor can the Commission order any of Resevoil's customers to cease and desist from using those plates.

The Commission, and properly so, has only been concerned with the representations as to the jewels in those plates used by various Resevoil customers.

And, specifically, the Commission has here deliberated the representations of Waltham with respect to patented Resevoil jewels.

The attention of the Court is invited to 35 U.S.C.A. 103, which states: "a patent may not be obtained though the invention is not identically disclosed or described as set forth in Section 102 of this Title, *if the difference between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which such subject matter pertains.*"

[25] P.A. p. 29

"Patentability shall not be negated by the manner in which the invention was made." (*Emphasis supplied*)

In essence, this section of the patent act, commonly known as the Patenf Act of 1952, provides that a subsequent patent will not issue unless the subject matter thereof was not obvious in the prior art.

It is a familiar maxim of patent law that the claim defines the invention.[56]

Petitioners maintain that in the present commercial development (8 jewel Resevoil) the Court has confronted for the first time the mounting of the covered jewel in a recess separated from the recessed filler plate whereby a cavity is formed between the chambers containing the "floating" or "idler" jewels and the space within the bearing, thus constituted, to be lubricated.[57]

The addition of a separate filler plate was acutely important in the commercial assembly, and added the 8 patented lubricating jewels to four simple hole jewel bearings thereby constituting (forming) a new and improved Resevoil jewel bearing assembly.

It is further maintained that the patent claims, which are both novel and unusual and an advance in the prior art citing the earlier Fichter patent, stand in an even more favorable patent position because the history of the prosecution of patent #2,920,441 was not only considered by the examining division of the

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[56] *Bishop and Babcock Mfg. Co. v. Fedders-Quigan Corp.*, 6 A.2d 122 U.S.P.Q. 542; *Intl. Latex Corp. v. Warner Bros. Co.*, (D.C. Comm.) 120 U.S.P.Q. 149; *Geo. D. Converse and Co., Inc. v. Standard Packaging Corp.*, (D.C.N.J.) 122 U.S.P.Q. 230.

[57] See patent claims in #2,920,441; also testimony of Fordon, P.A. pp. 146-170, 186-187.

United States Patent Office, but the question of claim allowance was also considered by that agency's administrative tribunal.[88]

Finally, it is urged that it would be unfair and inequitable to require any user of the product of the patent to denote the patented lubricating jewels by any term other than jewel, especially since they are conceded to be made from the same material as other watch jewels and because the record establishes that they are so made for the same reasons other watch jewels are made from the same synthetic substance.[89]

Throughout the patent (#2,920,441) the stones involved in the patent claims are referred to and characterized as "jewels".[90]

The patent granted speaks for itself even though a patentee is his own lexicographer.[91]

It appears to be arbitrary and capricious for one government agency to issue a patent monopoly with its associated rights and privileges, which patent has been carefully scrutinized in an examining procedure involving not only the customary examination but also a "sieving" through the administrative tribunal (P.O. Board of Appeals), and for another agency of the government to destroy or remove the effectiveness of the monopoly by requiring the patent users to define his

[88] Patent Office Board of Appeals.

[89] See testimony Tordion, P.A. pp. 146-150.

[90] P.A. pp. 186-187.

[91] *Marion v. Ford*, (D.C. So. Cal.) 117 U.S.P.Q. 378; *Turchan v. Bailey Meter Co.*, (D.C. Del.) 119 U.S.P.Q. 165; *In re Hall & Stokes*, (C.C.P.A.) 117 U.S.P.Q. 403.

invention in strange and unusual terms inconsistent or outside the scope of the monopoly granted.

The examiner in his Initial Decision here referred to a multitude of consent orders and stipulations within the Commission which he relied upon in finding that 33 years of acquiescence in an obsolete or even nonexistent definition, justified adoption of the definition in the instant *litigated* case wherein the evidence convincingly establishes the error inherent in the adoption of that definition.

Granting that the Commission has jurisdiction to stand in the way of fraud and deception, can it exercise that jurisdiction so as to impede inventive progress, constitutionally encouraged and Congressionally guaranteed?

This would not, we submit, be the first time that a definition had to bow in acquiescence to the advancement of knowledge. Did not Newton's theory and Einstein's Relativity, as outrageous examples, result in the discard of mathematical and metaphysical maxims generally accepted before the advances were suggested? Columbus did not prove *the world* round, he disproved accepted definition.

CONCLUSION

Wherefore, for the Reasons stated, the petitioners pray that this Petition For A Writ of Certiorari addressed to the United States Court of Appeals for the Seventh Circuit To Review the Final Decree Affirming and Enforcing the Final Order of the Federal Trade Commission in its Docket No. 6914 be granted.

Respectfully submitted,

B. Paul Noble

Attorney for Petitioners

CERTIFICATE OF SERVICE

I certify that a true carbon copy of the foregoing Petition For A Writ of Certiorari was mailed, first class, postage prepaid, to the Honorable Archibald Cox, Solicitor General of the United States, Department of Justice, Washington, D.C., and another such copy in like manner to J. B. Truly, Esq., Assistant General Counsel, Federal Trade Commission, Washington, D.C., all on this 12th day of May, 1964.

B. PAUL NOBLE

Of Counsel:
HUGHES, DUFF & NOBLE
2022 R Street, N.W.
Washington, D.C. 20009
387-3292

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 14,022

WALTHAM PRECISION INSTRUMENT COMPANY, INC., a corporation, formerly known as Waltham Watch Company, Waltham Watch Company, a corporation, and JOSEPH AXLER and MELVIN AXLER, individually and as former officers of said corporations, *Petitioners*,

v.

FEDERAL TRADE COMMISSION, *Respondent*.

Final Decree Affirming and Enforcing Order to Cease and Desist

Waltham Precision Instrument Company, Inc., a corporation, formerly known as Waltham Watch Company, Waltham Watch Company, a corporation, and Joseph Axler and Melvin Axler, individually and as former officers of said corporations, petitioners herein, having filed in this Court on December 19, 1962, a petition for review praying that the order to cease and desist issued against them by the Federal Trade Commission, respondent herein, on October 16, 1962, in a proceeding before it entitled "In the Matter of Waltham Precision Instrument Company, Inc., et al., Docket 6914" be modified or the complaint dismissed; and a copy of said petition having been served upon respondent; and the respondent having thereafter certified and filed in this Court a transcript of the entire record in said proceeding; and the matter having been heard by this Court on briefs and oral argument on December 9, 1963, and this Court having rendered its decision on January 8, 1964, affirming said order and commanding obedience to the terms thereof:

Now Therefore, It Is Hereby Ordered, Adjudged and Decreed that the prayer of the aforesaid petition for review to modify the order of the Federal Trade Commission or to dismiss the complaint be, and it hereby is, denied;

It Is Further Ordered, Adjudged and Decreed that the order to cease and desist of the Federal Trade Commission be, and it hereby is, affirmed, and that petitioners be, and they hereby are, commanded forthwith to obey said order and to comply therewith.

By the Court.

s/ John S. Hastings
Chief Judge

s/ Wm G. Knoch
United States Circuit Judge

s/ Latham Castle
United States Circuit Judge

A True Copy:
Teste:

Kenneth J. Carrick
Clerk of the United States Court of Appeals for the Seventh Circuit.

Entered:

APPENDIX B

Final Order.

BEFORE THE FEDERAL TRADE COMMISSION.

(Caption—6914)

Commissioners:

Paul Rand Dixon, Chairman.
Sigurd Anderson,
William C. Kern,
Philip Elman,
Everette MacIntyre

FINAL ORDER.

Respondents having filed, under Section 4.22(c) of the Commission's Rules of Practice, exceptions to the proposed order in this proceeding, reasons in support thereof and a proposed alternative form of order, and counsel supporting the complaint having filed a reply opposing said exceptions and

The Commission having determined that respondents have not given sufficient grounds for modification of the proposed order, and that said order should be entered and adopted as the Final Order of the Commission:

It is Ordered, that respondents' exceptions to the proposed order be, and they hereby are, denied.

278 It Is Further Ordered that respondents, Waltham Precision Instrument Company, Inc., a Massachusetts corporation, formerly known as Waltham Watch Company; Waltham Watch Company, a Delaware corporation; and Joseph Axler and Melvin Axler, individually and as former officers of said corporations, their agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or dis-

tribution of watches in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing in any manner, directly or indirectly, including any use of a number in the name or names of their watches, that watches manufactured or sold by them containing a designated number of jewels, unless said watches actually contain the stated number of jewels, each and every one of which serves a purpose of protecting against wear from friction by providing a mechanical contact with a moving part at a point of wear.

2. Using the name "Waltham" in advertising or in labeling to designate or describe watches manufactured or sold by them, without expressly, clearly, conspicuously, and prominently stating in immediate connection therewith the country of origin of each component of said watches which is not entirely manufactured in the United States.

3. Using, in advertising or labeling watches manufactured or sold by them, the terms "America's first watch", "the first American watch company", "American", or any similar word or expression, to describe respondents or such watches.

4. Furnishing any means or instrumentality to others whereby the public may be misled as to any of the matters or things prohibited by the above provisions of this order.

It Is Further Ordered that the allegation of the complaint that respondents' use of the term "ruby" in describing the stones in their Resevoil device violated Section 5 of the Federal Trade Commission Act be, and it hereby is, dismissed.

279 It Is Further Ordered that the complaint, insofar as it relates to individual respondents Irving H. Stolz, Seth Harrison and Frank Silver, be, and it hereby is, dismissed.

It Is Further Ordered that respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

By the Commission.

Joseph W. Shea,
Secretary.

Issued: October 16, 1962.

APPENDIX C

BEFORE FEDERAL TRADE COMMISSION

Commissioners:

Paul Rand Dixon, Chairman
Sigurd Anderson
William C. Kern
Philip Elman
Everette MacIntyre

Docket No. 6914

In the Matter of WALTHAM PRECISION INSTRUMENT COMPANY, INC., a corporation, formerly known as WALTHAM WATCH COMPANY, WALTHAM WATCH COMPANY, a corporation; and JOSEPH AXLER, MELVIN AXLER, IRVING H. STOLZ, SETH HARRISON and FRANK SILVER, individually and as officers or former officers of said corporations.

OPINION OF THE COMMISSIONER

By Commissioner Elman:

This case is before the Commission on cross-appeals from the initial decision of the hearing examiner.[1]

In 1956 respondents Joseph and Melvin Axler, and others associated with them, acquired control of the Waltham Watch Company, a Massachusetts corporation. Joseph and Melvin Axler became respectively, president and executive vice-president, and members of the board of directors, of the corporation. In the same year the Waltham Watch Company licensed Hallmark, Inc., to use the trademark "Waltham" on watches sold by it in the United States.

About July 1, 1957, the Waltham Watch Company, by means of a "spin off", transferred its watch business to

[1] The examiner also dismissed the complaint as to three of the individual respondents, Irving H. Stolz, Seth Harrison and Frank Silver. No appeal was taken from that action.

a new Delaware corporation which adopted the same name. The Massachusetts corporation was renamed the Waltham Precision Instrument Company, Inc. Joseph and Melvin Axler became president and vice-president, and members of the board of directors, of the Delaware corporation.

In 1959 the Waltham Watch Company of Delaware was merged with Hallmark, Inc., under the name Waltham Watch Company. At this time the Axlers terminated their association with the company.

Most of the advertising and labeling in the record in this proceeding was disseminated during the existence of the Massachusetts corporation as the Waltham Watch Company, and while this company was controlled by the Axlers who served as its chief executive officers. The Commission concurs; therefore, in the examiner's finding that the Axlers and the Massachusetts corporation, now known as the Waltham Precision Instrument Company, Inc., are proper parties respondent herein and were properly made subject to the order to cease and desist. The Waltham Watch Company of Delaware is also properly subject to this order, not only because it succeeded to the watch business of the Massachusetts corporation but because, as the record shows, the deceptive advertisement of Waltham watches was continued by Hallmark, Inc., which is now merged with Waltham Watch Company of Delaware.

I.

The record shows that respondents' "Waltham" watches contain 17-jewel movements imported from Switzerland to which have been added a so-called "Resevoil" device containing eight additional synthetic stones. These watches were advertised and labeled as 25-jewel watches. The following examples are noted by the examiner:

"Waltham Premier 25"

"The 25-jewel Premier by Waltham"

"The 25 jewel Premier group has patented oil reserve jewels, a horological development that adds 8 extra ruby jewels to the customary 17 friction-bearing jewels." The complaint alleges, and we find, that by these statements "respondents have represented, directly or by implication, that said watches contain 25 jewels, each of which serves a mechanical purpose as a frictional bearing, that is, each jewel provides a mechanical contact at a point of wear."

It is uncontested that only the 17 jewels contained in the imported movements of respondents' watches come in contact with any other moving parts at points of wear. Respondents claim, however, that the 8 stones in the Resevoil device perform a useful function in reducing friction in that they retain oil and distribute it to the bearings over which they are located; and, therefore, that the description of these stones as jewels and their inclusion in the total number of jewels contained in Waltham watches is not deceptive.

An identical contention was rejected by the Commission in *Allen V. Torneck Company*, 55 F.T.C. 1770 (1959). That case, like this one, involved the advertisement of stones contained in the patented "Resevoil" device as jewels. Although the "Resevoil" device in *Torneck* was covered by an earlier patent and contained only four synthetic stones, they were located in the same places over the wheel bearings of the watch and were claimed to have the same lubricating function as the eight stones in the "improved" device. The Commission considered the function of "jewels" used in watch movements and the understanding of the meaning of this term in the trade. It found that "Jewels are used [as bearings] instead of some other material because of their extreme hardness, their ability to take a high polish, and their relative imperviousness to wear and changes in temperature." In addition to bearing jewels, watches also frequently contain so-called "roller" and

"pallet" jewels which come in contact with moving parts, although intermittently, at points of wear. These jewels are also used because of their hardness and resistance to wear. The Commission concluded that the meaning of the term "jewel" in the watch industry is determined by the function which these synthetic stones perform. It stated that "The experts who testified on the subject, although they may have used different terminology, all appeared to agree that every jewel in the traditional 17-jewel and 21-jewel watch is a friction bearing jewel in the sense that they contact a moving part at a point of wear. They likewise agreed in essence that the Resevoil stones are not friction bearing jewels because the properly installed Resevoil stone does not touch a moving part."

In sum, the Commission found that "the industry looks upon a jewel as a small, hard, highly processed stone placed in a watch movement to contact a moving part at a point of wear." The Commission concluded, therefore, that to describe Resevoil stones as jewels was deceptive. As the opinion of the Commission pointed out, "to qualify for the term 'jewel', as understood by the industry, it is not enough that it serve some useful function. It must perform the function with which the word 'jewel' has long been associated." The order of the Commission was affirmed in a *per curiam* opinion, 276 F.2d 513 (C.A. D.C. 1960), cert. denied, 364 U.S. 829.[2]

---

[2] Although the *Tornck* case is the most directly in point, it was not the first time that the Commission had considered the meaning of the term "jewel" in the advertisement of watches. The same definition of "jewel" was adopted in *N. Shure Company*, 12 F.T.C. 105 (1928), and has appeared in at least ten stipulations and consent orders in which parties agreed to cease and desist from representing that watches sold by them contained a stated number of jewels, unless each and every jewel serves "a mechanical purpose as a frictional bearing." 10 F.T.C. 583-585 (1926); 10 F.T.C. 590, 593 (1926); 10 F.T.C. 593, 596 (1926); 10 F.T.C. 603, 606 (1926); 11 F.T.C. 494, 497 (1926); *Bulova Watch Co.*, 16 F.T.C. 528, 532

On the basis of the Commission's decision in *Tornek*, the long history of similar Commission orders, and the additional testimony taken in this proceeding, the examiner held that the respondents' representation of the stones in the Resevoil device as "jewels" was deceptive and in violation of the Federal Trade Commission Act.

Respondents appeal from this finding of the examiner on four principal grounds: first, that complaint counsel failed to establish the meaning of the term "jewel" in the watch trade; second, that the opinion of the Court of Appeals in the *Tornek* case modified the Commission's definition; third, that regardless of the meaning of the term "jewel", respondents' advertisements were not the same as those challenged in *Tornek* and were not deceptive; and fourth that respondents must be permitted to call the stones in the Resevoil device "jewels" since this is the way they are described in the Resevoil patent and in fact the only way in which they can be described.[3]

We find no merit in any of these contentions. The examiner properly relied upon *Tornek* and the other prior Commission cases in determining the meaning of the term "jewel" as used in the watch trade. "The facts in that regard obviously do not vary, depending on whether Seller X rather than Y happens to be the respondent." *Manco Watch Strap Co., Inc., et al.*, Docket 7785, March 13, 1962,

(1932); *Roseman Enterprises Company*, 52 F.T.C. 467, 471 (1955); *Windsor Pen Corporation*, 52 F.T.C. 655, 658 (1956); *Cimier Watch Corp.*, 54 F.T.C. 542, 544 (1957); *World Wide Watch Co.*, 55 F.T.C. 1072, 1074 (1959).

[3] In its "Exceptions to Examiner's Findings", respondents deny that either Waltham or "interests controlling Hallmark" ever obtained any interest in the Resevoil patents. But the issue in this proceeding is the description by respondents of the stones contained in the Resevoil devices incorporated in their watches. The ownership of the Resevoil patents is obviously irrelevant to this issue.

The testimony and other evidence in the present proceeding serve only to corroborate the meaning of the term "jewel" which the Commission found in *Tornek;* and, in any event, are sufficient in themselves to support the examiner's finding.

Nor can we agree that the definition of the term "jewel" was in any way modified by the opinion of the Court of Appeals in the *Tornek* case. The court stated:

> "Examination of the testimony before the Federal Trade Commission shows clearly that in the 21-jewel watch commonly sold by others in the trade there are no jewels that do not have either a function of bearing or a function of protection against wear from friction, and that it is only stones that perform these functions that are properly called 'jewels' in the watch industry. "As to the Resevoil device in question, convincing evidence indicated that the four stones of the Resevoil did not serve a mechanical function of bearing or a protection against frictional wear. Petitioner's statement that the Resevoil watches were 21-jewel watches is therefore misleading."

Respondents claim that since the Resevoil stones have "a function of protection against wear from friction", the court's opinion permits them to be described as jewels. But the court was obviously referring to protection from wear by reason of the qualities which the Commission found to be the characteristics of jewels, i.e., their hardness and imperviousness to wear. Had it disagreed with the Commission's definition, the Court of Appeals would not have granted enforcement of the Commission's order, which required that each "jewel" serve "a mechanical purpose as a frictional bearing".[1]

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[1] A petition for rehearing which contended there was an inconsistency between the Commission's and the court's definition of "jewel" was denied (March 23, 1960).

Although respondents' advertisements were slightly different from those in *Zenith*, their representation of the stones in the Reservoir device as "jewels" was no less deceptive. Respondents' intimation (Brief, p. 7) that an asterisk followed by a clear and conspicuous explanation of the type of jewels concerned, appeared after the word "jewel" in all of its advertisements is not substantiated by the record. To the casual reader the phrase that would stand out in many of these advertisements is "25 jewel". Even if the reader went further he would find no statement that any of these jewels were not the usual friction-bearing jewels, but only that some of them were "oil-reserve jewels", a phrase which, this record makes clear, has no meaning in the watch trade. As the Commission recently had occasion to point out, *Giant Food, Inc.*, Docket 7773 (June 13, 1962), such "explanations" or "disclaimers" are not likely to save the casual reader from being misled. The record in this case plainly shows that respondents' "explanation" of the term "25 jewel" failed to avoid the deception inherent in their advertisements.

Finally, description of the Reservoir stones as jewels cannot be justified on the ground that they are so described in the Reservoir patent. The patent was not a license to advertise watches containing the device in any particular manner. *Cf., Decker v. Federal Trade Commission*, 176 F.2d 461 (C.A. D.C. 1949), cert. denied, 338 U.S. 878. If respondents wish to describe the Reservoir device in advertisements for their watches, they must do so truthfully. The stones in this device may be described as what they are, tiny bits of synthetic material. They may not be described by a term, whether it appears in the patent or not, which accurately reflects neither their composition nor their function.

II.

Complaint counsel appeals from the examiner's limita-

tion of the order to "jewels" in the Resevoil or similar devices. The examiner gave no reason for this limitation. We agree that it is unnecessarily restrictive. The violation alleged and proved in this record is the representation as "jewels" of stones which do not perform a mechanical purpose to reduce friction and wear. The record shows that the practice of "up-jeweling" has been accomplished in many ways, of which the Resevoil device is only one. In the *Torniek* case and in the other proceedings cited above which have involved the use of the term "jewel" in the sale of watches the Commission's orders have prohibited any misrepresentation of the number of jewels in the respondents' watches. We believe that, in view of the nature of the misrepresentations shown by the record, such an order is necessary here to protect the public.[5]

III.

On the second principal charge in the complaint, the examiner found that respondents had used "the old and famous American name 'Waltham' . . . repeatedly in various ways to mislead the public into believing that the old Waltham firm is still manufacturing all parts of its watches in the United States." This finding is compelled by the record. The following excerpts from respondents' advertising and labeling show how they have made use of this name:

> "The 25-jewel Premier by Waltham . . . America's First Watch."
>
> "Waltham, the first American watch company"
>
> "Waltham is the first American standardized watch"

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[5] In the interest of clarity we are modifying the language of the order to make it clear that the term "jewel" is not limited to stones used as bearings, but may also properly be used to describe those which, like the pallet and roller jewels, are employed because of their resistance to wear in making contact with other moving parts.

"Introducing * * *, your new Waltham watch. Precision made to the traditionally high quality specifications of America's first watch maker. It is made by expert watchmakers using scientific methods and precision machinery and embodies the skills developed during Waltham's 102-year existence. Nowhere in the world are there better equipped or more thoroughly experienced craftsmen."

The record shows, and in fact respondents urge, that the name Waltham has, over a period *of 100 years and more, come to be associated by the public with watches manufactured by the famous old American company bearing that name.* As the advertisements quoted above show, the Axler management and Hallmark exploited this common understanding of the name Waltham by repeatedly referring to it as "America's First Watch", made by "the first American watch company", etc. The fact is, however, that the movements of the watches sold by respondents under the name "Waltham" are not made in the United States at all, but are imported from abroad. the sale of such watches under a name long associated by the public with entirely American-made products—an association accentuated by respondents' own advertising—is obviously deceptive. The Commission has always prohibited the use of names which carry false implications of a product's country of origin.[9] The fact that such a name is a trademark is irrelevant. *Cf., Edward P. Paul & Company, Inc.* v. *Federal Trade Commission*, 169 F.2d 294 (C.A.D.C., 1948).

The examiner's order on this phase of the case, simply prohibits respondents from representing "that their watches are manufactured in their entirety in the United States." This prohibition will not suffice to assure discon-

[9] See, *e.g., Standard Sewing Equipment Corp.*, 51 F.T.C. 1012, 1029-31 (1955); *El Mogo Cigar Co.* v. *Federal Trade Commission*, 107 F.2d 429 (C.A.4, 1939); *Alvin M. Hanim*, Docket 7749 (May 12, 1960); *Couristan, Inc.*, Docket 7853 (September 29, 1960).

tinuance of the deception found. As we have pointed out, the name Waltham, in part through respondents' own efforts, has come to be associated by the public with entirely American-made watches. Deception of the public can be avoided only by requiring respondents wherever they use the name "Waltham" in the advertisement or labeling of their watches, to disclose clearly and prominently, the foreign origin of any of the components thereof. Respondents should be prohibited from using the term "American", or any reference to "Waltham", in any *manner or context suggesting that the watches which they sell under the Waltham name are made in the United States.* To provide effective relief these provisions are necessary at least until such time as the harmful effects of respondents' deceptive advertising have been erased. If and when this has been accomplished, the Commission will entertain any application for such modification as may then be appropriate. *Cf., Federal Trade Commission v. National Lead Co.*, 352 U.S. 419.

IV.

The examiner found that no deception was likely to result from respondents' use of the term "ruby" in describing the synthetic stones in their Rosewoil devices, since all of the advertisements containing this expression were addressed to the trade rather than to the general public. Complaint counsel does not challenge the findings that these advertisements were addressed only to the trade, and that those in the trade would not be likely to be deceived by such use of the term "ruby." We can find no reason to reverse the examiner's conclusion on this issue.

The appeal of respondents is denied. The appeal of counsel supporting the complaint is granted in part and denied in part. The findings and conclusions contained in the initial decision, as modified and supplemented by this opinion,

are adopted as the findings and conclusions of the Commission. The order contained in the initial decision is set aside, and an order in conformity with this opinion will be issued.

July 20, 1962

APPENDIX D

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

WALTHAM PRECISION INSTRUMENT COMPANY INC., ET AL., *Petitioners*,

v.

FEDERAL TRADE COMMISSION, *Respondent*

No. 14022

January 8, 1964

B. Paul Noble, Washington, D.C., Seymour Rady, Chicago, Ill., for petitioner.

J. B. Truly, Asst. General Counsel, Louis Russell Harding, II, Attorney, Federal Trade Commission, Washington, D.C., James McI. Henderson, General Counsel, Jno. W. Carter, Jr., Attorney, for the Federal Trade Commission, for respondent.

Before HASTINGS, Chief Judge, and KNOCH and CASTLE, Circuit Judges.

HASTINGS, Chief Judge.

This case is before us on a petition for review of an order issued by the Federal Trade Commission after an administrative proceeding based on an amended complaint charging petitioners[1] and others[2] with unfair acts and practices and unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C.A. § 45, 66 Stat. 632.[3]

[1] Pertinent parts of § 5(a) of the Act read:

"(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful

Petitioners were charged in the amended complaint with false and deceptive advertising relative to the distribution of watches imported from Switzerland and which carried on the face or dial of the watch the name "Waltham Premier 25." The watches were referred to as "25 jewel Walthams," when in fact they were 17-jewel watches. The watches were represented as being manufactured in their entirety in the United States by the well known and long established Waltham Watch Company, when in fact they were made up of watch movements manufactured in Switzerland and watch cases from either Switzerland or the United States.

After a hearing, the examiner found the allegations of the amended complaint to be true and entered a cease and desist order against petitioners.

Upon review by the full Commission, the examiner's findings were upheld in most particulars and the Commission entered its final order in a slightly modified form.[4]

"(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations, * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

[4] "IT IS ORDERED that respondents' exceptions to the proposed order be, and they hereby are, denied.

"IT IS FURTHER ORDERED that respondents, Waltham Precision Instrument Company, Inc., a Massachusetts corporation, formerly known as Waltham Watch Company; Waltham Watch Company, a Delaware corporation; and Joseph Axler and Melvin Axler, individually and as former officers of said corporation, their agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of watches in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease desist from:

"1. Representing in any manner, directly or indirectly, includ-

A Commission opinion by Commissioner Elman was filed.

Waltham Watch Company, a Massachusetts corporation, had been a widely known manufacturer of watches and clocks for many years in Waltham, Massachusetts. In 1956, it ceased manufacturing watches there. It opened an office in New York City and began purchasing movements from Switzerland and watch cases in both Switzerland and the United States, and to assemble such watches.

In 1956, petitioners Joseph and Melvin Axler, and others associated with them, acquired control of this corporation. They were officers and directors and formulated and con-

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ing any use of a number in the name or names of their watches, that watches manufactured or sold by them contain a designated number of jewels, unless said watches actually contain the stated number of jewels, each and every one of which serves a purpose of protecting against wear from friction by providing a mechanical contact with a moving part at a point of wear.

"2. Using the name 'Waltham' in advertising or in labeling to designate or describe watches manufactured or sold by them, without expressly, clearly, conspicuously, and prominently stating in immediate connection therewith the country of origin of each component of said watches which is not entirely manufactured in the United States.

"3. Using, in advertising or labeling watches manufactured or sold by them, the terms 'America's first watch,' 'the first American watch company,' 'American,' or any similar word or expression, to describe respondents or such watches.

"4. Furnishing any means or instrumentality to others whereby the public may be misled as to any of the matters or things prohibited by the above provisions of this order.

"IT IS FURTHER ORDERED that the allegation of the complaint that respondents' use of the term 'ruby' in describing the stones in their Resevoil device violated Section 5 of the Federal Trade Commission Act be, and it hereby is, dismissed.

"IT IS FURTHER ORDERED that the complaint, insofar as it relates to individual respondents Irving H. Stolz, Seth Harrison and Frank Silver, be, and it hereby is, dismissed."

trolled the policies and practices of the corporation. In the same year the Massachusetts corporation licensed Hallmark, Inc., to use the trademark "Waltham" on watches sold by it in the United States.

About July, 1957, Waltham Watch Company, by means of a "spin-off," transferred its watch business to a new Delaware corporation which adopted the same name. Its office and principal place of business was in New York City; Joseph and Melvin Axler were officers and directors of the Delaware corporation and controlled its operation.

The Massachusetts corporation was renamed Waltham Precision Instrument Company, Inc. It continued in business in Waltham, Massachusetts, engaging in the manufacture of various precision instruments, other than watches.

In 1959, Waltham Watch Company of Delaware was merged with Hallmark, Inc., under the name of Waltham Watch Company. The offices were transferred to Chicago, Illinois. At that time, the Axlers terminated their association with the company.

Most of the advertising and labeling shown in the proceeding record was disseminated during the existence of the Massachusetts corporation as the Waltham Watch Company, and while under control of the Axlers.

The facts pleaded in support of the charges were the facts as they existed prior to July, 1957. However, as shown above, the Delaware corporation succeeded to the watch business of the Massachusetts corporation. The record shows the alleged deceptive advertising was continued after its merger with Hallmark, Inc.

The advertising and distribution of the watches were on a national scale. Typical of such advertising were the following:

"Waltham Premier 25."

"The 25 jewel Premier by Waltham."

"The 25-jewel Premier group has patented oil reserve jewels, a horological development that adds 8 extra ruby jewels to the customary 17 friction-bearing jewels."

"Watches that are worthy successors to the famed, history-rich Waltham creations of the past 107 years."

"Presenting the 25 Jewel Premier by Waltham * * * America's first watch."

"Introducing * * * your new Waltham watch * * * It is made by expert watch makers * * * and embodies the skills developed during Waltham's 102-year existence. Nowhere in the world are there better equipped or more thoroughly experienced craftsmen."

"Waltham, the first American watch company."

The record shows that petitioners' "Waltham" watches contain 17-jewel movements imported from Switzerland. To these movements have been added a so-called "Resevoil" device containing eight additional synthetic stones. The Resevoil device is patented and consists of a small metal plate containing the jewel-like stones whose function is to lubricate pivots or other moving parts of the watch. They do not touch anything and do not serve any mechanical function as a friction bearing.

Petitioners' claim that the stones in the Resevoil device are in fact "jewels" (being described in the patent as such) was determined adversely to their contention by the Commission in In the matter of Allen v. Fornek Company, 55 F. T. C. 1770, 1772-1775 (1959); affirmed Per Curiam, Fornek v. F. T. C., 107 U.S. App.D.C. 267, 276, F.2d 513 (1960), cert. denied 364 U.S. 829, 81 S.Ct. 68, 5 L.Ed.2d 57.

(1) The fact that the patent granted on the Resevoil device described the stones as jewels granted no immunity against misrepresentations in advertisements. Decker v. Federal Trade Commission, 85 U.S.App.D.C. 137, 176 F.2d

461, 463 (1949), cert. denied 338 U.S. 878, 70 S.Ct. 159, 94 L.Ed. 539.

Petitioners contend that the tradename "Waltham" originally meant watches made in Waltham, Massachusetts. By its long use, petitioners argue, it lost this geographic meaning and acquired a secondary meaning as being watches manufactured by the owner of that tradename; hence the Delaware corporation had the right to advertise the watches as "Waltham." This same argument was heard and laid to rest in a recent case in this court concerning the same Delaware corporation. Waltham Watch Company v. F. T. C., 7 Cir., 318 F.2d 28, 31-32 (1963), cert. denied 375 U.S. 944, 84 S.Ct. 349, 11 L.Ed.2d 274 (December 9, 1963.)

(2) Any right petitioners have to use the tradename "Waltham" does not permit its use "in a manner designed to deceive the public," and "(t)hose who put into the hands of others the means by which they may mislead the public, are themselves guilty of a violation of Section 5 of the Federal Trade Commission Act." Id., 318 F.2d at 32.

(3, 4) On consideration of the record as a whole, we conclude that the Commission's findings as to the facts are supported by substantial evidence. On judicial review, therefore, we hold them to be conclusive. Universal Camera Corp. v. N. L. R. B., 340 U.S. 474, 487—491, 71 S.Ct. 456, 95 L.Ed. 456 (1951).

(5) The advertising was published by the Massachusetts Corporation under control of the Axlers: the watch business was subsequently transferred to the Delaware corporation; and the Delaware corporation was merged with Hallmark, Inc. Under the facts of this case, the Commission acted well within its authority in fashioning its order to prevent future deception and to close all roads to its prohibited goal. Waltham Watch Company v. F. T. C.,

supra, 318 F.2d at 32. Petitioners were properly made subject to the Commission order.

(6) Finally, petitioners complain that paragraph 2 of the cease and desist part of the order is confusing and constitutes administrative harassment because they are directed to cease and desist from using the name "Waltham" in advertising or labeling without "prominently stating in immediate connection therewith the country of origin of each *component* of said watches which is not entirely manufactured in the United States." (Emphasis added.)

We think petitioners have misread the meaning of "component" in its use in this phrase. The Commission concedes an oral argument that *the watch movement is a single component* and that the word does not mean each part of the movement. We accept the meaning advanced by the Commission and, with this interpretation, petitioners will not suffer therefrom.

We have considered other contentions presented by petitioners and find them to be without merit.

The order of the Federal Trade Commission is in all respects affirmed. Enforcement will be granted.

Enforcement ordered.

APPENDIX E

In the Supreme Court of the United States

No. _____

OCTOBER TERM, 1963

WALTHAM PRECISION INSTRUMENT CO., ET AL., *Petitioners,*

vs.

FEDERAL TRADE COMMISSION

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

May 7th, 1964

/s/ TOM C. CLARK
Associate Justice of the Supreme Court of the United States.

Dated this 7th day of April, 1964

APPENDIX F

15 U. S. C. A. 45(a)

Unfair methods of competition unlawful; prevention by Commission—Declaration of unlawfulness; power to prohibit unfair practices.

(a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to chapter 9 of Title 49, and persons, partnerships, or corporations subject to sections 181-203, 205-228 and 229 of Title 7, except as provided in section 227 of Title 7, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

APPENDIX G

15 U S C A 45(b)

PROCEEDING BY COMMISSION; MODIFYING AND SETTING ASIDE ORDERS

(b) Whenever the Commission shall have reason to believe that any such person, partnership or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership or corporation may make application, and upon good cause shown shall be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the the act or practice in question is prohibited by sections 41-46 and 47-58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership or corporation an order requiring such person, partnership or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been

duly filed within such time, or if a petition for review has been filed within such time then until the transcript of the record in the proceeding has been filed in a circuit court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such a manner as it shall deem proper, modify or set aside in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or law have so changed as to require such action or if the public interest shall so require: *Provided, however*, that the said person, partnership or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

APPENDIX H

15 U. S. C. A. 1064.

CANCELLATION OF REGISTRATION

A verified petition to cancel a registration of a mark, stating the grounds relied upon, may, upon payment of the prescribed fee, be filed by any person who believes that he is or will be damaged by the registration of a mark on the principal register established by this chapter, or under the Act of March 3, 1881, or the Act of February 20, 1905—

(c) at any time if the registered mark becomes the common descriptive name of an article or substance, or has been abandoned, or its registration was obtained fraudulently or contrary to the provisions of section 1054 of this title or of subsection (a), (b) or (c) of section 1052 of this title for a registration hereunder, or contrary to similar prohibitory provisions of said prior Acts for a registration thereunder, or if the registered mark is being used by, or with the permission of, the registrant so as to misrepresent the source of the goods or services in connection with which the mark is used; or . . .

(e) at any time in the case of a certification mark on the ground that the registrant (1) does not control, or is not able legitimately to exercise control over, the use of such mark, or (2) engages in the production or marketing of any goods or services to which the certification mark is applied, or (3) permits the use of the certification mark for purposes other than to certify, or (4) discriminately refused to certify or to continue to certify the goods or services of any person who maintains the standards or conditions which such mark certifies:

Provided, That the Federal Trade Commission may apply to cancel on the grounds specified in subsections (c) and (e) of this section any mark registered on the principal

register established by this chapter, and the prescribed fee shall not be required. July 5, 1946, c. 540, Title I, § 14, 60 Stat. 433; Oct. 9, 1962, Pub. L. 87-772, § 9, 76 Stat. 771.

APPENDIX I

15 U. S. C. A. 1115

SAME; REGISTRATION ON PRINCIPAL REGISTER AS EVIDENCE OF EXCLUSIVE RIGHT TO USE MARK; DEFENSES

(a) Any registration issued under the Act of March 3, 1881, or the Act of February 20, 1905, or of a mark registered on the principal register provided by this chapter and owned by a party to an action shall be admissible in evidence and shall be prima facie evidence of registrant's exclusive right to use the registered mark in commerce on the goods or services specified in the registration subject to any conditions or limitations stated therein, but shall not preclude an opposing party from proving any legal or equitable defense or defect which might have been asserted if such mark had not been registered.

(b) If the right to use the registered mark has become incontestable under section 1065 of this title, the registration shall be conclusive evidence of the registrant's exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the affidavit filed under the provisions of said section 1065 subject to any conditions or limitations stated therein except when one of the following defenses or defects is established:

(1) That the registration or incontestable right to use the mark was obtained fraudulently; or

(2) That the mark has been abandoned by the registrant; or

(3) That the registered mark is being used, by or with the permission of the registrant or a person in privity with the registrant, so as to misrepresent the source of the goods or services in connection with which the mark is used; or

(4) That the use of the name, term, or device charged to be an infringement is a use, otherwise than as a trade or service mark, of the party's individual name, in his own business, or of the individual name of anyone in privity with such party, or of a term or device which is descriptive of and used fairly and in good faith only to describe to users the goods or services of such party, or their geographic origin; or

(5) That the mark whose use by a party is charged as an infringement was adopted without knowledge of the registrant's prior use and has been continuously used by such party or those in privity with him from a date prior to registration of the mark under this chapter or publication of the registered mark under subsection (c) of section 1062 of this title: *Provided, however*, That this defense or defect shall apply only for the area in which such continuous prior use is proved; or

(6) That the mark whose use is charged as an infringement was registered and used prior to the registration under this chapter or publication under subsection (c) of section 1062 of this title of the registered mark of the registrant, and not abandoned: *Provided, however*, that this defense or defect shall apply only for the area in which the mark was used prior to such registration or such publication of the registrant's mark; or

(7) That the mark has been or is being used to violate the anti-trust laws of the United States. July 5, 1946, c. 540, Title VI, § 33, 60 Stat. 438; Oct. 9, 1962, Pub. L. 87-772, § 18, 76 Stat. 774.

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 13,858

WALTHAM WATCH COMPANY, a corporation, HARRY ARONSON, individually, and as an officer of said corporation, and LAWRENCE ARONSON, as an officer of said corporation, *Petitioners*,

v.

FEDERAL TRADE COMMISSION, *Respondent*.

Final Decree Affirming and Enforcing Order to Cease and Desist

Waltham Watch Company, a corporation, Harry Aronson, individually and as an officer of said corporation, and Lawrence Aronson, as an officer of said corporation petitioners herein, filed in this Court on August 16, 1962, a petition to review and set aside an order to cease and desist issued against them on June 15, 1962, by the Federal Trade Commission, respondent herein, in a proceeding before it entitled "In the Matter of Waltham Watch Company, a corporation, et al., Docket 7097;" and a copy of said petition having been served upon respondent; and the respondent having thereafter certified and filed in this Court a transcript of the entire record in said proceeding; and the matter having been heard by this Court on briefs and oral argument on May 22, 1963, and this Court having rendered its decision on June 5, 1963;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the prayer of the aforesaid petition to set aside the order of the Federal Trade Commission as to the petitioners herein be, and it hereby is, denied;

It Is Further Ordered, Adjudged and Decreed that the order to cease and desist of the Federal Trade Commission

be, and it hereby is, affirmed, and that petitioners be, a
they hereby are, commanded forthwith to obey said ord
and to comply therewith.

By the Court.

s/ F. Ryan Duffy
United States Circuit Judge

s/ Roger J. Kiley
United States Circuit Judge

s/ Casper Platt
United States District Judge
Sitting on the United States
Court of Appeals for the
Seventh Circuit

Entered: June 28, 1963

A True Copy:
Teste:

Kenneth J. Carbicle
Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX K

BEFORE FEDERAL TRADE COMMISSION

(Caption 7997)

Commissioners:

Paul Rand Dixon, Chairman
Sigurd Anderson
William C. Kern
Philip Elman
Everette MacIntyre

Decision of the Commission and Order to File Report of Compliance

This matter having been heard by the Commission upon the exceptions to the initial decision filed by respondents, Waltham Watch Company, Harry Aronson and Lawrence Aronson, and upon briefs and oral argument in support thereof and in opposition thereto; and

The Commission having determined that the hearing examiner's findings and conclusions are fully substantiated on the record and that the order contained in the initial decision is appropriate in all respect to dispose of this matter:

It is ordered that Respondents' exceptions to the initial decision be, and they hereby are, denied.

It Is Further ordered that the respondents, Waltham Watch Company, a corporation, Lawrence Aronson, as an officer of said corporation, Harry Aronson, individually and as an officer of said corporation, and David Singer and Muriel Singer, individually, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

JOHN W. SHEA,
Secretary

Issued: June 15, 1962

APPENDIX L

BEFORE FEDERAL TRADE COMMISSION.

(Caption—7997)

INITIAL DECISION.

Order.

It Is Further Ordered that Waltham Watch Company, a corporation, and its officers and Harry Aronson, individually and as an officer of said corporation, and Lawrence Aronson as an officer of said corporation, and said respondents' officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the use of the name "Waltham" in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

I. Using or authorizing any person to use the name "Waltham" in connection with the sale of clocks or any other product unless it supervises said use and insures that the name is so utilized that:

1. The public is clearly warned by a statement *immediately in connection therewith*, that the product is not manufactured by the Waltham Watch Company of Waltham, Massachusetts, and,

2. If the product is of foreign origin, the country of origin of the product is clearly and conspicuously disclosed on the product, on the advertising used in offering it for sale, and on any package or container in which the product is enclosed, in such manner that the name of the country of origin will not be hidden, obscured or obliterated.

II. Placing any means or instrumentality in the hands of others whereby they may mislead the public.

as to the manufacturer of any product which they sell, the manufacturer's age, experience and reputation or the country of origin of the product.[3]

It Is Further Ordered that the complaint is dismissed as against respondent, Lawrence Aronson, individually, but not as an officer of respondent Waltham Watch Company.

/s/ Walter K. Bennett,
Hearing Examiner.

November 14, 1961.

APPENDIX M

The Constitution, Article 1, Section 8, Clause 8

...To promote the progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

LIBRARY
SUPREME COURT, U.S.

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1081

WALTHAM PRECISION INSTRUMENT COMPANY, INC., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

The Federal Trade Commission brought this proceeding to prevent false and deceptive advertising, in violation of Section 5 of the Federal Trade Commission Act, in connection with the distribution of watches (App. 1–6, 9–14).[1] The misrepresentations

[1] Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45, provides in pertinent part:

"(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

* * * * * * *

"(a)(6) The Commission is empowered and directed to prevent persons * * * from using unfair methods of competition

738-519

charged to petitioners related to the use (a) of the widely-known trade name "Waltham" to give the impression that the watches were made entirely in the United States, and (b) of a device containing eight synthetic stones to give the impression that 17-jewel watches were in fact 25-jewel watches.

In 1956 petitioners Joseph and Melvin Axler, and others associated with them, acquired control of the Waltham Watch Company, a Massachusetts corporation which had been in the watch business for many years. Joseph and Melvin Axler became respectively president and vice-president, and members of the board of directors, of the corporation. In the same year, the corporation licensed Hallmark, Inc., to use the name "Waltham" on watches sold by it in the United States (Pet. 61–62).

In 1957, the Massachusetts corporation changed its name to the Waltham Precision Instrument Company, Inc., and transferred its watch business to a newly organized Delaware corporation. The Delaware corporation assumed the name of Waltham Watch Company and the Axlers became officers and directors of the Delaware corporation (Pet. 62). Two years later, the Waltham Watch Company of Delaware was merged with Hallmark, Inc., under the name of Waltham Watch Company. At this time the Axlers terminated their association with the company (*ibid.*).

The instant proceeding was brought in 1957 against Waltham Watch Company, the Axlers, and several

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in commerce and unfair or deceptive acts or practices in commerce."

"App." refers to the "Appendix to Petitioner's Brief" in the court of appeals.

others (App. 1–6).[2] After an administrative hearing, the Commission held that the record "compelled" the examiner's finding that petitioners had used "the old and famous American name 'Waltham' * * * repeatedly in various ways to mislead the public into believing that the old Waltham firm is still manufacturing all parts of its watches in the United States" (Pet. 55), when in fact the movements of the watches sold under the "Waltham" name were not made in the United States at all, but were imported from abroad (Pet. 56).

With respect to the charge that petitioners falsely represented that their 17-jewel watches contained 25 jewels, the Commission found as follows: The "Waltham" watches contained 17-jewel movements imported from Switzerland to which petitioners added a so-called "Resevoil" device containing 8 additional synthetic stones. Only the 17 jewels come in contact with any other moving parts at points of wear. The 8 stones in the "Resevoil" device, which petitioners claimed reduced friction by retaining oil and distributing it to the bearings over which they are located, do not come in contact with any moving parts at points of wear. Petitioners' contention that it is nevertheless not deceptive to represent the stones contained in the "Resevoil" device as jewels, was identical, the Commission found, to the contention it had rejected in *Allen V. Torneck Company*, 55 F.T.C. 1770. In that case, the Commission pointed out, it had

[2] An Amended and Supplemental Complaint was filed in March 1958, adding Waltham Precision Instrument Company as a defendant (App. 9-14).

found that the industry recognizes a jewel as a small, hard, highly processed gem placed in a watch movement to come in contact with a moving part at a point of wear, and that to qualify for the term "jewel" it is not enough that the "Resevoil" stones serve some useful function—they must perform the function with which the word "jewel" has long been associated (Pet. 49–51). The order in *Tornek* was affirmed in a *per curiam* opinion, 276 F. 2d 513 (C.A.D.C.), rehearing denied, *ibid.*, certiorari denied, 364 U.S. 829, rehearing denied, 364 U.S. 906.[3]

The Commission concluded that "[t]he testimony and other evidence in the present proceeding serve only to corroborate the meaning of the term 'jewel' which the Commission found in *Tornek*: and, in any event, are sufficient in themselves to support the examiner's finding" (Pet. 53).[4] Accordingly, the Commission upheld the examiner's finding that petitioners' representation of the stones in the "Resevoil" device as "jewels" was deceptive.

The Commission also concurred in the examiner's finding that the Axlers and the Massachusetts corpo-

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[3] The Commission regarded as immaterial certain factual differences between the instant case and *Tornek*. It said (Pet. 50):

"Although the 'Resevoil' device in *Tornek* was covered by an earlier patent and contained only four synthetic stones, they were located in the same places over the wheel bearings of the watch and were claimed to have the same lubricating function as the eight stones in the 'improved' device."

[4] The Commission also pointed out that *Tornek* was not the first time that it had considered the term "jewel" in the advertisement of watches. The same definition of jewel had been adopted in cases going back to the middle of the 1920's (Pet. 51, n. 2).

ration were properly made subject to the cease and desist order, since "[m]ost of the advertising and labeling in the record in this proceeding was disseminated during the existence of the Massachusetts corporation as the Waltham Watch Company, and while this company was controlled by the Axlers who served as its chief executive officers" (Pet. 49).

The court of appeals affirmed the order of the Commission (Pet. 65).

1. With a single exception noted below, there is no issue here which was not presented either in *Waltham Watch Co.* v. *Federal Trade Commission*, No. 495, this Term, certiorari denied, 375 U.S. 944, rehearing denied, 375 U.S. 998, or in *Tornek* v. *Federal Trade Commission*, No. 282, O.T. 1960, certiorari denied, 364 U.S. 829, rehearing denied, 364 U.S. 906. Each of petitioners' contentions with respect to the finding of deception in the use of the trade name, "Waltham" was presented in *Waltham* (the deception there related to clocks rather than to watches), and the issues urged by petitioners as arising out of the finding of deception in advertising the stones contained in the "Resevoil" device as "jewels" were presented in *Tornek*. The reasons which led to the denial of the petitions in those cases are equally applicable here, and we refer the Court to our memorandum in opposition in *Waltham* and our brief in opposition in *Tornek*.

2. The one issue not presented in those cases is the contention that, because Waltham Precision Instrument Company is no longer in the watch business

and the Axlers have had nothing to do with the Waltham Watch Company since 1959, it was error to make them parties to the order, even though most of the misrepresentations were made by the Massachusetts corporation while under the Axlers' control (Pet. 49). Since, however, the record is not clear whether Waltham Precision has agreed never to sell watches under the "Waltham" name (App. 29) and since there is no assurance that neither Waltham Precision nor the Axlers will return to the watch business, the court below correctly held that the Commission acted within its discretion in fashioning the order to protect the public against future deception (Pet. 64–65). *Keasbey & Mattison Co.* v. *Federal Trade Commission*, 159 F. 2d 940, 951 (and case cited) (C.A. 6); *Standard Container Mfrs.' Ass'n* v. *Federal Trade Commission*, 119 F. 2d 262, 265 (C.A. 5). As the court stated in *Standard Containers*, 119 F. 2d at 265, "if these petitioners are really out of [the] business to stay, they can take no harm from it."[5]

[5] Petitioner Waltham Watch Company also complains that the entry of the two orders against it—the one in No. 495, *supra*, and the one in the instant case—is "redundant, confusing, and * * * constitutes administrative harassment" (Pet. 30). Petitioner, however, had adequate opportunity to raise this issue before the Commission (App. 38, 39, note), but failed to do so (App. 52–59). Quite apart from the fact that it also failed to raise the issue in its petition for review in the court below (App. 170–174), petitioner is foreclosed from raising it now by the settled rule that issues not raised before an administrative agency are not open before the reviewing court. *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 414; *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 37.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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WILLIAM H. ORRICK, JR.,
Assistant Attorney General.
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JUNE 1964.